RECORD AND BRIEFS

No. 15-789

Supreme Court, U.S.
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In the Supreme Court of the United States

DEBORAH K. JOHNSON, WARDEN, *Petitioner,*

v.

DONNA KAY LEE, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JOSHUA A. KLEIN
Deputy Solicitor General
MICHAEL R. JOHNSEN
Supervising Deputy Attorney General
ROBERT M. SNIDER*
Deputy Attorney General

STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
300 South Spring Street, Suite 1702
Los Angeles, California 90013
Telephone: (213) 897-2387
Bob.Snider@doj.ca.gov
**Counsel of Record*

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This case presents two questions: Whether federal habeas courts must respect, as an "adequate" state procedural bar, California's rule requiring defendants to raise their claims on direct appeal; and whether the burden of proof with respect to adequacy rests on a habeas petitioner or on the State. Because every State applies some version of the same procedural rule (*see* Alabama Br. 1 & n.2), the case is also an ideal vehicle for considering more generally what sort of regularity of application makes a state procedural bar "adequate" for purposes of federal habeas review.

California's *Dixon* rule is long-established and regularly applied (Pet. 3, 7), and serves purposes this Court has long recognized as compelling (Pet. 23). The decision below holds that the State nonetheless failed to prove that the rule is "adequate," because the State did not, by analyzing the records of thousands of state cases, demonstrate that state courts apply the rule "mechanically," in every or almost every case in which it could possibly be applied. Pet. 9-11, 12-15. That approach is far different from allowing federal habeas review where a State has improperly closed the doors of its own courts by invoking a procedural bar in some way that is unfairly surprising or arbitrary or discriminates against federal claims. *See* Pet. 20. Instead of serving the adequacy doctrine's purposes, the decision below deepens a conflict over allocation of the burden of proof (Pet. 16-18), undermines fundamental principles of federal habeas review (Pet. 19-22)—and threatens to impose an extraordinary burden on the federal courts, which must now review de novo claims that state courts have never entertained because they were not raised on direct appeal. It warrants review by this Court.

1. Lee contends primarily (Opp. 6-10) that the decision below involves only the "adequacy" of one

procedural rule as applied by one State. But the court's opinion will govern every adequacy challenge to any procedural bar in every Ninth Circuit State. To avoid de novo review of a claim that a habeas petitioner failed to advance using appropriate state-court mechanisms, States must now prove to the court of appeals' satisfaction that their courts apply a given bar "mechanically." Pet. App. 11a. A petitioner's "'modest'" showing of purportedly variable application—here, nine cases where state courts denied relief on the merits rather than under a possibly applicable *Dixon* bar—may require a State to research the records of hundreds or thousands of other cases to divine whether and why a bar was applied or not applied in each. Pet. 9-11. States that cannot bear that burden, or that grant their courts discretion to reject meritless claims on the merits instead of applying potentially available procedural bars, will be punished by having those bars disregarded on federal habeas no matter how plain the petitioner's default. Pet. 14-15, 20-21. Federal habeas courts will have to review hundreds or thousands of corresponding claims de novo. If the court of appeals' decision were as narrow and inconsequential as Lee suggests, every other State in the Ninth Circuit (and 16 others) would not be joining California in urging review. Alabama Br. 1.

Lee also argues that the decision below holds *Dixon* inadequate only as to the period surrounding Lee's 1999 default (Opp. 6-7); but courts responsible for applying the decision have perceived no such limitation. *See Jaustraub v. Frauenheim*, 2016 WL 785284, at *2 (E.D. Cal.) (*Lee* "eviscerated" the *Dixon* bar).[1] Moreover, Lee's argument demonstrates just

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[1] *See, e.g., Olic v. Knipp*, 2015 WL 10438925, at *4-5 (C.D. Cal.) (holding procedural bar unenforceable under *Lee* for (continued...)

how burdensome the Ninth Circuit's approach is. Under the decision below, no application of the *Dixon* bar can be effective in federal habeas unless the State, having obtained and reviewed countless case files, shows which ones applied, and which could have supported, a *Dixon* default. Federal courts will then have to evaluate whether that amounts to a showing of the bar's "mechanical[]" application. That California, other States, and the courts might have to undertake this exercise not just once per bar, but over and over, period-by-period, only *increases* the burden imposed.

2. As to the circuit conflict over who bears the burden of persuasion on issues of adequacy (Pet. 17), Lee argues (Opp. 11-12) that the Ninth and Tenth Circuits have addressed "court-created" procedural rules, while the Fifth Circuit considered a "legislative" rule.[2] But each circuit's rule, whatever its origin, applies to all state procedural defaults. There is no reason to believe the Ninth or Tenth Circuits would enforce a different burden for state rules enacted by statute. *E.g.*, Alabama Br. 1 n.2 (listing state statutory equivalents to *Dixon*).[3]

Lee also argues that under any approach the State will assert default, the prisoner will challenge

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(...continued)
Dixon default that occurred during 2012 appeal); *Murphy v. Ducart*, 2015 WL 6549092, at *4 (C.D. Cal.).

[2] Lee does not discuss the differences between the Ninth and Tenth Circuits' standards, or internal inconsistencies in Second and Fourth Circuit doctrine. Pet. 17-18 & n.9.

[3] As Lee observes (Opp. 11, 15), this Court denied review when the Ninth Circuit adopted its burden rule in *Bennett v. Mueller*, 322 F.3d 573 (9th Cir. 2003). But at that time the rule had never been applied. *Id.* at 586. The decision in this case applies the rule, with startling results. The issue is thus well-positioned for review.

adequacy, and the State "will no doubt seek the last word." Opp. 14. Undoubtedly, whenever the issue is joined both sides will offer whatever evidence and arguments they have. What matters, however, is not the order of proof but the ultimate burden of persuasion—and the sort of proof required to meet it. *Cf. U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714-715 (1983) (focus in discrimination litigation must be on "ultimate factual issue," not on parsing the analytical burden-shifting framework). Lee's arguments do not undercut the conflict over and importance of those issues.[4]

3. Who bears the burden of establishing "adequacy" and what must be shown to establish it are fundamentally related. Here, California showed that its courts routinely applied the *Dixon* bar, invoking it in hundreds of dismissals around the time of Lee's default. Pet. App. 17a. Lee, in contrast, pointed to nine cases in which relief was denied on the merits where it might have been possible to deny relief under *Dixon* instead. Pet. App. 55a. Neither Lee nor the court of appeals ever found any instance of a state court *granting* relief despite a *Dixon* default. They did not contend that *Dixon* is invoked to discriminate against federal claims or disfavored petitioners, or that reasonable direct-appeal counsel would have misunderstood whether failure to advance a record-based claim on appeal would bar raising the claim later. Yet the decision below faults the

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[4] Lee suggests in passing that in the court below the State "abandoned its argument that it should not bear the ultimate burden of proving adequacy." Opp. 5. In her appellate briefing, however, Lee argued that the State was "improperly placing the burden of proof on the petitioner." Lee C.A. Reply Br. 7 (Dkt. No. 30). In any event, the court of appeals squarely addressed the burden issue (*e.g.*, Pet. App. 8a-9a, 14a-17a), and Lee does not argue that it is not properly presented for review.

State for not responding to Lee's slight showing of purported "inconsistency" by examining some four thousand case files to prove the number of "'cases [to which] the *Dixon* bar *should* have been applied.'" Opp. 8. Lee does not appear to contest that, in the Fifth Circuit, her case would have come out the other way.

Lee contends the State "vastly overstates the burden placed upon it" (Opp. 9), because the court of appeals disclaimed requiring any particular statistical showing (Opp. 8, arguing that *Bennett* "did not dictate which records the State must produce, or how it must prove the adequacy of any particular bar"). But Lee, like the court of appeals, signally fails to suggest what less burdensome showing would be acceptable. As one court in the Ninth Circuit has observed:

> Although not banning [it] *per se*, the opinion leaves little doubt that the *Dixon* procedural default is completely ineffectual in federal habeas—absent a statistical analysis of enormous time and expense (a case-by-case analysis for a set of thousands of state habeas cases when the bar should have been utilized by the state courts, but was not, and then compared to cases in which the bar was utilized), or some other undefined, non-statistical analysis or event which [the court] cannot conceive of at the present time.

Jaustraub, 2016 WL 785284, at *2. In the name of avoiding unfairness to state prisoners, the decision below forbids reliance on a common state procedural bar rule, while giving States and district courts no guidance concerning any reasonable showing the

State could make to secure federal respect for its rule.

Lee does not solve this problem by saying (Opp. 24 n.2) that States are better positioned than prisoners to research underlying case files—even if one accepts the assertion of a comparative advantage.[5] Fundamentally, the comparison is irrelevant if the burden being imposed cannot be justified in the first place.

4. The question of what showing is necessary or sufficient to prove or disprove adequacy is of broad importance, and well presented for consideration in this case. Unlike *Beard v. Kindler*, 558 U.S. 53, 63 (2009), where an atypical procedural default provided "an unsuitable vehicle for providing broad guidance on the adequa[cy] ... doctrine," this case involves procedural default under a rule that is universal in American courts. The Court may therefore squarely answer whether "adequacy" for federal habeas purposes demands, as the decision below holds, that a rule be "mechanically" applied. Pet. App. 11a.

a. The cases from this Court that Lee cites (Opp. 16-17) do not require any such thing, whether under the rubric "consistently applied" or "regularly followed" (*see, e.g., id.*; Pet. 8, 12). Lee's two cases

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[5] The State's resources, too, are constrained, and many petitioners—like Lee herself—have counsel when contesting the adequacy of a bar. Pet. App. 32a-33a (noting 2008 appointment of counsel). Counsel—particularly institutional counsel such as the federal public defender's office, capably representing Lee here—could presumably pool efforts addressing common procedural bars. Moreover, those challenging *Dixon*'s adequacy would have had constitutionally-guaranteed counsel at the time any claim was omitted on direct appeal. If a default results from that counsel's ineffectiveness, it does not bar habeas review. *Dretke v. Haley*, 541 U.S. 386, 394 (2004). Lee has made no such claim here. Pet. 4 n.3.

holding a bar inadequate involved quite different concerns. When *Johnson v. Mississippi*, 486 U.S. 578, 587-588 (1988), observed that a rule had not been "consistently or regularly applied," the default at issue was based on failure to raise a claim in a type of hearing that the state supreme court had previously made clear was "not the appropriate forum" for such claims. In *Barr v. City of Columbia*, 378 U.S. 146 (1964), concern that procedural rules must be "appl[ied] evenhandedly to all similar cases" (Opp. 16) made perfect sense in the context of assuring that special burdens were not arbitrarily imposed on disfavored defendants—there, African-Americans protesting segregation.[6]

A non-mechanical approach, moreover, is fully consistent with "the entire federal doctrine of procedural default" (Opp. 15). Federal courts can and should "carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." *Walker v. Martin*, 562 U.S. 307, 321 (2011). They can and should hold a state ground "inadequate when 'discretion has been exercised to impose novel and unforeseeable requirements.'" *Id.* at 320. *See generally Kindler*, 558 U.S. at 63-64 (Kennedy, J., concurring) (noting adequacy concerns where procedural requirement is "novel," or there is some "indication that the [state court] adopted its forfeiture rule out of ...

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[6] *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989), did not require mechanical application of a state rule. In observing that a rule's "faithful[] appli[cation]" in "the vast majority of cases" was more relevant than a "few" counterexamples, *Dugger* refused to view purported inconsistencies as undermining the adequacy of a sound general rule. *Dugger*, unlike the court below (*see* Pet. App. 18a), also refused to treat a case as evidence of insufficiency when it was not clear whether a bar was applied. *Id.*

hostility toward legitimate constitutional claims"). Instead of concentrating on these factors, however, the decision below focuses the inquiry on questions that are either irrelevant to, or undermine, the adequacy doctrine's fundamental concerns.

b. It is hard to imagine, for example, why federal courts should treat a state case as invidiously "inconsistent" simply because the state court bypassed a possibly applicable procedural bar and instead denied relief on the merits. *See* Pet. 14-15; *Martin*, 562 U.S. at 319 (finding "no reason to reject California's time bar simply because a court may opt to bypass the [timeliness] assessment and summarily dismiss a petition on the merits if that is the easier path"). Similarly, it serves no purpose to require, in effect, that state courts must always first "mechanically" apply a rule, and only then note the applicability of an exception (Opp. 2)—or that, when multiple defaults apply, each must be separately noted (Pet. App. 19a). Such requirements hinder state court systems' self-management without advancing any aim of the adequacy doctrine.

There likewise is no reason to view state courts' occasional explanation or refinement of a bar as an admission of "inconsistency," as Lee and the decision below do with respect to *In re Harris*, 5 Cal. 4th 813 (1993), and *In re Robbins*, 18 Cal. 4th 770 (1998). *See* Opp. 22-23; Pet. App. 15a. *Harris* viewed *Dixon* (and the complementary rule precluding habeas relitigation of claims resolved on direct appeal, *see* Pet. 5 n.5) as "firmly established and often repeated," but deemed it "important to reexamine and reiterate [their] purpose," lest those longstanding rules become (in Justice Holmes' words) "'encysted in phrases and thereafter for a long time cease to provoke further analysis.'" 5 Cal. 4th at 826. The court's reexamination showed that the relevant statutes, rules, and

decades of precedent were in alignment: "absent strong justification, issues that could be raised on appeal must initially be so presented, and not on habeas corpus in the first instance." *Id.* at 826-829. *Harris*'s one alteration to precedent was to hold that, in light of the "evolution" of this Court's Sixth Amendment doctrine, certain defaults that had previously been assessed under *Dixon*'s exception for "fundamental constitutional error" should instead be evaluated as questions of ineffective assistance of appellate counsel. *Id.* at 830-834. Apart from that change (which is irrelevant here), *Harris* simply reviewed and applied existing doctrine. *E.g.*, *id.* at 836-841. And there is no basis for Lee's characterization of *Robbins* as "substantially amending the *Dixon* rule 'in order to provide guidance.'" Opp. 22 (quoting *Robbins*, 18 Cal. 4th at 814 n.34). In context, *Robbins*'s "guidance" (not amendment) involved the court "comment[ing] briefly upon various disparate aspects of our order practice," to explain how its summary orders should be interpreted, 18 Cal. 4th at 814 n.34—another clarification that is irrelevant here.

Every system restates and refines procedural rules over time. Such a process should not, without more, make a rule unclear or inadequate for federal habeas purposes. *Cf. Kindler*, 558 U.S. at 65 (Kennedy, J., concurring) ("A too-rigorous or demanding insistence that procedural requirements be established in all of their detail before they can be given effect in federal court would deprive the States of the case law decisional dynamic that the Judiciary of the United States finds necessary and appropriate for the elaboration of its own procedural rules.").

Finally, the court of appeals' stress on "mechanical" application requires unfounded limitations on the applicability of this Court's recent precedent. This Court has warned that the adequacy doctrine

must respect the need for state-court discretion in the application of procedural bar rules. Pet. 22. Lee, like the court below, seeks to limit that principle to rules involving some "inherently discretionary" term (Opp. 20-21), such as the "prompt[ness]" requirement that was at issue in *Martin*. But neither Lee nor the court of appeals identifies how such a limitation would serve "'[s]ound procedure,'" *Martin*, 562 U.S. at 320-321, or avoid unsatisfactory incentives, *id.* (warning it would be "'particularly unfortunate'" if States "'opt for mandatory rules to avoid the high costs that come with plenary federal review'" because the adequacy doctrine "forced [them] to choose between mandatory rules certain to be found 'adequate,' or more supple prescriptions that federal courts may disregard as 'inadequate'"). Lee similarly does not identify how the adequacy doctrine's central concerns are advanced by ignoring the special respect that is due to procedural rules that are widespread in the States, *Kindler*, 558 U.S. at 62, or that are "'substantially similar to those to which we give full force in [federal] courts,'" *Martin*, 562 U.S. at 318. *See* Pet. 15. If this Court's cases have indeed left any ambiguity in these respects, the need for further clarification is another reason for review here.

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The decision below does not simply affect state courts' ability to enforce their own procedural rules. It allows habeas petitioners, intentionally or not, "'to avoid the exhaustion requirement by defaulting their federal claims in state court.'" *Martin*, 562 U.S. at 316. It forces States to expend extraordinary resources to gain federal recognition of even the most basic, widespread, and commonsense rules of procedure. And it imposes unnecessary and unjustified work on the federal courts, both in evaluating challenges to adequacy and in reviewing, de novo and

without the benefit of any prior state review, claims which would otherwise be procedurally barred. These effects of the decision, and the burdens it imposes on the States, are both broadly important and wholly unjustified. They warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JOSHUA A. KLEIN
Deputy Solicitor General
MICHAEL R. JOHNSEN
Supervising Deputy Attorney General
ROBERT M. SNIDER*
Deputy Attorney General
Counsel of Record

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